MATRIMONIAL DOMICILE

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Domicile is a term which is not easy of precise definition, but one nevertheless with a real and well-understood legal meaning. What of the term "matrimonial domicile"? Has it an equally clear meaning, or an obscure one, or is it only a convenient expression to describe the joint home of two persons joined in wedlock? Courts and text-writers talk of "matrimonial domicile" in two wholly different situations, and apparently it may mean a different thing in each, for no reference is made in one connection to its use in the other. The law of the "matrimonial domicile," it is said, determines the rights which are given the parties to a marriage in the movable property of each other. The phrase makes its second appearance when the question is raised as to the validity of a divorce granted at the domicile of one of the parties only, without personal service upon the other. The significance of "matrimonial domicile" in marital property rights will first be considered.

I

Suppose the easiest case. A of Iowa marries B of Iowa, and after the marriage the spouses make their home there. There is, of course, no difficulty with any question of domicile in this situation. Both parties were domiciled in the state and remain so afterwards. By the marriage, each is given such interest in the movable property of the other as the law of Iowa, the domicile, allows. It is, of course, immaterial where the marriage took place. The question of "matrimonial" domicile as something different from "actual" domicile is not brought up.

Now, let A the husband come from Illinois and B the wife be an Iowa woman, and suppose by Illinois law the personal property of the wife becomes the husband's upon marriage. Upon marriage, B would take her husband's domicile, Illinois. She acquires that domicile upon marriage, and the domicile's law gives A the property. The result is not made any clearer by saying that the law of the "matrimonial domicile" governs the property rights. Illinois law governs because it is the husband's domicile which becomes that of the wife. "Matrimonial domicile" might be used here as a term of convenience to describe the place where the

parties both have their home, but no added significance would be given by its use.

While cases involving facts as simple as the two just put are cited in proof of the general rule as to "matrimonial domicile," the real question of the existence of such a rule in this connection is yet to be tested. The general statement of the doctrine is as follows:

> "The question as to what place is to be regarded as the matrimonial domicile, the law of which will determine the effect of the marriage upon personal property owned by either party at the time, or subsequently acquired by either or both during the existence of such domicile, is in its last analysis one of the intention of the parties at the time of the marriage as to where they shall establish their residence, assuming that such intention is carried out within a reasonable time. The various rules that have been adopted on the subject are really rules for ascertaining that intention, or for supplying, by presumption, the lack of any evidence or other circumstances which will reveal it."[1]

Now, if a "matrimonial domicile" is one to be established by the intention of the parties, it differs greatly from domicile as that term is ordinarily understood, which is established by the law. The law says that every person must have a domicile because certain rights and liabilities depend upon domicile. And while the intention of the party is important in that the intention to make a home in a place must coincide with his physical presence there, no one would question that both elements are necessary to make a legal domicile. A domicile can not ordinarily be established by an intent alone, and it seems to be granted that in the absence of evidence of intention to the contrary, the parties are presumed to take the husband's domicile as their matrimonial domicile. The general rule that intent alone is not sufficient is so firmly established, that a statement that the parties to a marriage,

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[1] 57 L. R. A. 360, n. See, for a general statement of the rule, 5 R. C. L. 1007; 85 Am. St. Rep. 557; Story, *Conflict of Laws* (7th ed.) sec. 186; Wharton, *Conflict of Laws* (3d ed.) sec. 190. Cf. Westlake, *Private International Law* (5th ed. 1912) 40. That something different from ordinary domicile seems to be meant, is shown by the following note in Parmele edition of Wharton, 403: "The previous domicile of the parties seems to be entirely immaterial, except for the purpose of illustrating their intention as to the matrimonial domicile." The authorities are fully discussed below.

by mere intent, can make a "matrimonial domicile" in a place which is the domicile of neither one of them, and have the law of this place govern ownership in property, is to be regarded with suspicion unless it finds adequate support in the authorities. The prefix "matrimonial" would not, *a priori,* seem to have the magic effect of upsetting a reasonable and well established rule governing the acquisition of a domicile.

Assume that the newly married pair intend to make an entirely new home, as in the second case, where A of Illinois marries a young woman who has been a resident of Iowa up to the time of the marriage. The parties intend to live in Texas, where neither one has ever been up to this time. Suppose they go abroad on a trip before going to Texas. What are the rights in each other's property? Determined by the law of the "matrimonial domicile," the rule would say. But their matrimonial domicile is not in Texas yet, for the intention must be carried out within a "reasonable time." How long a trip can they take and still come within the reasonable time rule? And if they overstay the limit, what law will be found to have governed? Suppose instead of going to Texas, A finds a better position in London, and they settle there. Is this their "matrimonial domicile"? It was not the one they had in mind at the time of the marriage. If the wife had died before A got the London position, of how much of B's personal property owned by her at the time of the marriage had he become the owner so that it would not pass by descent? The answer to these questions without any doctrine of "matrimonial domicile" is simple enough. When A married B, the wife took A's Illinois domicile. His domicile remained in Illinois after they were married, because he had never established a new one, even though he had given up Illinois as his home. He got by the marriage such interest in her movable property as the law of Illinois gave. If they do go to Texas and acquire property there, or do live in London and acquire it, the law of Texas or of England will govern the marital rights in those acquisitions—nothing is left in abeyance awaiting the fulfillment of their intentions.

The test case, then, is the one where the intended domicile of the parties differs from that of the husband at the time of the marriage. Unless the authorities expressly cover such a case, is it not fair to say that the term "matrimonial domicile" is one of convenience only and means nothing more than the husband's domicile which the wife takes upon marriage?

As might be expected, the courts in their general statements on the doctrine of "matrimonial domicile" have been greatly influenced by Mr. Justice Story's discussion of "the rule of the true matrimonial domicile."[2] The learned author puts the case, "suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is to be deemed the matrimonial domicile?" "Foreign jurists," he says, "would answer that it is the domicile of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York. . . . The same doctrine," continues Judge Story, "has been repeatedly acted on by the supreme court of Louisiana." He summarizes thus:

> "Under these circumstances, when there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not perhaps too much to affirm that a contrary doctrine will scarcely hereafter be established. . . ."

The Louisiana cases cited by the author are *LeBreton v. Nouchet*[3] and *Ford's Curator v. Ford.*[4] Because they are put forth here as the only American cases on the doctrine, and because they are frequently cited in this connection, they are worth stating in some detail.

In the *LeBreton* case, the defendant and the daughter of the plaintiff, both evidently domiciled in New Orleans, ran away and were married in Mississippi, returning to New Orleans a few weeks thereafter and remaining there until the wife died. The mother of the deceased sued the defendant to recover property owned by the daughter prior to her marriage. By Mississippi law, all personal property of a woman went to her husband upon marriage, and the defendant claimed that his rights were governed by the law. He was allowed to retain only the marital portion given by the law of Louisiana. It is to be noted in this case that the parties were originally domiciled in New Orleans. While there was evidence that the husband had expressed an intention to make a home in Mississippi, the court thought this evidence was "insufficient to counterbalance the weight of the

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[2] Story, *op. cit.* secs. 191-199.

[3] (1813 La.) 3 Martin 60, 5 Am. Dec. 736.

[4] (1824 La.) 2 Martin N. S. 574, 14 Am. Dec. 201.

facts which disclose the real intention of the parties." *LeBreton v. Nouchet* presents no difficulty. Both parties started with a Louisiana domicile and kept it throughout. The husband got such rights in the wife's property upon marriage as Louisiana law gave him. There is not even talk in the case which supports argument for an intended "matrimonial," as distinct from an actual, domicile.

Ford's Curator v. Ford is just as simple. Mrs. Ford before her marriage had lived in Mississippi with her brother. The intended husband had a furnished house and a farm in Louisiana, and the day after the marriage, which took place in Mississippi, the parties left for Louisiana. The question in the case was the ownership of certain movable property owned by the wife before her marriage. If Mississippi law governed, the husband would have become the owner. The court said the question was whether the matrimonial rights of the wife were to be regulated according to the laws of the place in which the marriage was contracted, or those of the intended domicile of the spouses. It is held that Louisiana law governed, and it is clear that this is correct. It would have been equally clear even without evidence of the wife's expressed intention of going to Louisiana to live and her carrying out that intention after marriage. The wife took the husband's domicile upon marriage, and this would have been equally true even had she not gone to his home to live with him.[5]

The court made the following statement, which is the closest thing there is in either case to support the suggestion of Judge Story:

> "We think, however, that it may be safely laid down as a principle, that the matrimonial rights of a wife, who, as in the present case, marries with the intention of an instant removal, for residence in another state, are to be regulated by the laws of her intended domicile."

It is not denied that there are to be found in the books statements which directly or by inference recognize the rule which Judge Story predicted would become the recognized American doctrine, though they are fewer in number than the imposing array of citations in some of the authorities already quoted would lead one to expect. In most of the cases, the "matrimonial"

[5] See authorities cited by Professor Joseph H. Beale in his article, *The Domicile of a Married Woman* (1917) 2 So. LAW QUART. 93, 96.

domicile was no more than that of the husband at the time of marriage.[6] Others of the decisions do not involve any question of "matrimonial" domicile at all but merely cite the rule given by Story in the course of the discussion,[7] or state it generally.[8] It will be seen from the cases cited that most of the recognition of the doctrine has come from the Louisiana court. This is indeed the only place where it has been enunciated repeatedly and clearly.[9] The civil law writers referred to by Judge Story have doubtless had influence here.

The only case directly raising the point at issue is *McIntyre v. Chappell.*[10] Husband and wife, both being residents of Tennessee, were married in that state. Previous to, and at the time of, their marriage they had the intention of removing to Texas. Two weeks after the marriage the husband went to Texas with some negroes, improved the land, planted a crop, and the next year moved to Texas with his wife. The dispute in the case was over the ownership of certain slaves. They were claimed for the child of the parties, as sole owner, by right of inheritance from the father, and for the wife it was claimed they were com-

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[6] *Jaffray v. McGough* (1888) 83 Ala. 202, 3 So. 594; *Mason v. Fuller* (1869) 36 Conn. 160; *Parrett v. Palmer* (1893) 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *Townes v. Durbin* (1861 Ky.) 3 Metc. 352, 77 Am. Dec. 176; *Routh v. Routh* (1844 La.) 9 Rob. 224, 41 Am. Dec. 326; *Fisher v. Fisher* (1847) 2 La. Ann. 774; *Walker v. Duverger* (1849) 4 La. Ann. 569; *Hayden v. Nutt* (1849) 4 La. Ann. 65; *Percy v. Percy* (1854) 9 La. Ann. 185; *Connor v. Connor* (1855) 10 La. Ann. 440; *Arendell v. Arendell* (1855) 10 La. Ann. 566; *Mason v. Homer* (1870) 105 Mass. 116; *Harral v. Harral* (1884) 39 N. J. Eq. 279, 51 Am. Rep. 17; *Kneeland v. Ensley* (1838 Tenn.) Meigs, 620, 33 Am. Dec. 168; *Layne v. Pardee* (1852 Tenn.) 2 Swan, 232.

[7] *Long v. Hess* (1895) 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143; *Fuss v. Fuss* (1869) 24 Wis. 256, 1 Am. Rep. 180.

[8] *Re Hernandez's Succession* (1894) 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831.

[9] Thus, in *Arendell v. Arendell, supra,* the following charge of the trial court to the jury was approved by the supreme court: "It may, as it often does, occur, that the husband has no residence, or having one, it is the intention of the parties previous, and at the time of their marriage, to fix the matrimonial domicile in some other state. Cases of this sort are governed by the well recognized principle of law, that the laws of the intended domicile of the husband are to govern the rights of the parties. In such cases, the jury should be well satisfied, that the parties at the time of the marriage, intended to fix their matrimonial domicile elsewhere, and that that intention was actually carried into effect."

[10] (1849) 4 Tex. 187.

munity property in which she had a half interest. The trial court instructed (p. 93):

> "That if the jury believed that the parties intended to remove to Texas at the time of their marriage, and immediately did remove to Texas, their respective rights must be determined according to the laws of Texas."

Of this instruction the supreme court said:

> "The national domicile of these parties was, we think, unquestionably, in the state of Tennessee; and we are aware of no principle which, under the circumstances, would justify the conclusion that their matrimonial domicile was elsewhere . . . . We conclude that the matrimonial domicile of the parties to this marriage was in the state of Tennessee, and that previous to the acquisition of a domicile, *facto et animo,* by the husband in this country the laws of that state must furnish the rule of decision as to their marital rights. . . . In its application to the facts of this case, we therefore, conclude that the instruction in question was erroneous."

The ruling on this point was not essential to the determination of the case, and this the court admits.[11] But the question was presented by the record, was the point principally discussed in argument, and counsel concurred in expressing a desire that it be decided. It is of a wholly different kind of authority than a broad general statement where the exact point is not before the court.[12]

McIntyre v. Chappel was doubted in a later Texas decision.[13] This case is a good one to show how the facts of many of the cases lie close to the question which will test the correctness of the quoted rule, but not quite touch it. The contest was over the ownership of a slave—by the laws of Texas, movable property—which was levied on as the property of Barrow and claimed by his wife as her separate property. Husband and wife had resided in Mississippi, but had decided to move to Texas. While visiting

[11] As the learned judge points out, the verdict was against the law and the evidence and a new trial should have been granted, for the community law in any event would not have applied to this property.

[12] Says the editor of the 3d edition of Wharton, *Conflict of Laws,* Vol. I, 403 n.: "It is somewhat singular that, in the only case in which it appeared that the intention was to establish a matrimonial domicile at a place other than the previous domicile of either party, the applicability of the rule was denied."

[13] *State v. Barrow* (1855) 15 Tex. 179, 65 Am. Dec. 109.

Mrs. Barrow's parents in Tennessee, evidently while on their way to Texas, Mrs. Barrow's father gave her the slave in controversy for her own exclusive use and benefit. The Barrows took the slave directly to Texas. If Tennessee law governed, the slave became the husband's property; if Texas law, or Mississippi law, the separate property of the wife. The court said the question was whether Tennessee or Texas law was applicable, and held that the Texas law applied, evidently because the parties having intended to become domiciled in Texas must be deemed to have intended Texas law to govern future acquisitions. The Mississippi law, however, was in evidence. Applying the general principle that the former domicile was not lost until a new one was acquired, the law of Mississippi would govern, and the result of the case would be the same—the wife would get the slave. The court recognized this.

Professor Dicey defines a "matrimonial" domicile[14] as that of the husband at the time of the marriage, with a query whether the intended domicile is included under English law. As he says:

> " . . . On the theory . . . . of a tacit contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of the term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to be reasonable."

This tacit contract theory is discussed below. Westlake[15] seems to be more sure of this point. Wharton on *Conflicts*[16] believes that the "matrimonial" domicile is the intended permanent residence, but Minor[17] very vigorously and, it is submitted, correctly, says:

> "to hold that country where the husband intends to settle (the *factum* not combining with the *animus*) to be his domicile, whether 'matrimonial' or otherwise, is violative of one of the leading principles governing the acquisition of a domicile of choice."

Judge Story gives two grounds for his "matrimonial domicile" rule:[18]

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[14] *Conflict of Laws* (2d ed. 1908) 511.
[15] *Op. cit.* sec. 40.
[16] (3d ed.) sec. 190.
[17] *Conflict of Laws,* sec. 81.
[18] *Op. cit.* sec. 199.

> "Treated as a matter to be governed by the municipal law to which the parties were or meant to be subjected by their future domicile, the doctrine seems . . . capable of solid vindication."

This seems pure assertion, for no explanation is given of the way the municipal law can affect matters before the actual domicile is fixed there; and this is the very point to be established.

The second reason suggested is that of a tacit matrimonial contract. To this the author seems to incline, for stating his belief as to what the accepted doctrine will be, he adds:

> "for in England as well as in America, in the interpretation of other contracts, the law of the place where they are to be performed has been held to govern."[19]

Stating the argument a little more fully: A and B are to be joined in wedlock. They might have contracted expressly with reference to rights in property owned by them at the time or thereafter to be acquired;[20] but because they enter into no express contract, we will say that they tacitly contracted with reference to marital rights in property by accepting the provisions of the law in that respect. "The tacit contract is to be construed precisely as if the laws of the place were inserted in it."[21] And imputing further intentions to the parties, we can say they tacitly contracted according to the provisions of the law where they were going to live. This would be allowed either on the theory that the parties intended to be governed by this law in making their contract,[22] or that it was the place of performance.[23]

The doctrine of tacit contract seems to have found favor with European writers, and is not without support in the authorities in common-law jurisdictions.[24]

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[19] But elsewhere Judge Story does not appear to approve of the doctrine of tacit consent as regulating the rights and duties of matrimony. See Story, *op. cit.* sec. 190.

[20] Note that such an agreement is not a part of the marriage contract at all, but a wholly different one.

[21] *Castro v. Illies* (1858) 22 Tex. 479, 73 Am. Dec. 277, 283.

[22] "As the contract of marriage was entered into and solemnized with the intention that it should be performed and fulfilled in the state of Connecticut. . . ." *Mason v. Fuller* (1869) 36 Conn. 160, 162.

[23] Authority may be found for either or both of these views as to the law governing the validity of contracts. See articles discussing the subject by Professor Joseph H. Beale (1909) 23 HARV. L. REV. 79, 194, 260.

[24] See Story, *op. cit.* sec. 147 *et seq.;* Wharton, *Conflict of Laws* (3d ed.) 190; Westlake, *Private International Law* (5th ed.), 74 *et seq.* In *Besse*

The whole argument seems to go at the question the wrong way. Calling a marriage a contract does not solve the legal puzzle of the relationships arising therefrom. It is true that people get into the married state *via* the contract route. But, once in, there is a relationship created which is much more than a matter of contract, and which depends for its rights and duties not upon the consent of either of the parties, but upon the authority of the law. Would it be argued that the common-law right of a husband to discipline his wife with a stick no bigger than his thumb was a matter of tacit consent between the spouses? The right of control over the wife's person seems clearly a right given by law as an incident of the marital status, but hardly more clearly than the right of curtesy in her reality and ownership of her chattels, and the power to reduce her *choses* in action to possession. Any explanation of marital rights on the basis of a tacit contract flies in the face of the facts. Laymen generally know very little about the law until they get involved in a lawsuit, and two young people anxious to wed do not sit up nights reading up on the law of marital property. They probably know very little about it, and what knowledge they do have is of the most general and indefinite kind. For the common law to give the husband all the wife's personal property, and then say that the reason is because the wife tacitly contracted to give it, is adding insult to injury.

A tacit agreement, if real, ought still to apply when the parties move from their first marital home to another jurisdiction and there acquire property; but there is ample authority that in such a case, the first law no longer applies, and the law of the new domicile governs.[25] The tacit agreement, if there were such a

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v. Pellochoux (1874) 73 Ill. 285, 292, the court says: "In all marriages, the parties may be presumed to tacitly adopt the laws of their domicile, and to agree to be governed by them, but the obligation will be limited by the extent of these laws."

[25] *Saul v. His Creditors* (1827 La.) 5 Martin N. S. 569, 2 Beale, *Cas. on Conflict of Laws*, 220 and cases cited; Wharton, *op. cit.* sec. 191; Story, *op. cit.* sec. 178; 57 L. R. A. 366, n. The contrary seems to have been held in an English case, *De Nicols v. Curlier* (1899, H. Lords) [1900] A. C. 21. The case is stated in Westlake, *op. cit.* 79: "The consorts, both French by nationality and domiciled, were married in France without express contract, and therefore under the system of community. They removed to England, where the husband was naturalized, and where they amassed by their industry a large fortune, of which a part was invested in English freeholds and leaseholds and a part remained in money and securities.

thing, ought to apply to land as well as to personalty; but rights in land acquired by parties upon marriage are governed by the law of the *situs* of the land.[26]

"Matrimonial domicile" may be used as a term of convenience to designate the domicile of the husband which the wife assumes upon marriage;[27] but as used to describe a place where an actual domicile has not been established, the doctrine seems utterly opposed to settled common-law rules of domicile, whatever may be said for it under any other system of law. It is not established by conclusive authority. The repeated citation of the language of Judge Story seems another case where the shadow of a great name has darkened the clearness of judicial expression.

II

What is "matrimonial domicile" in a divorce suit? The term is a recent one in this branch of law. Writers on conflict of laws do not use it; nor do the standard writers on domestic relations; nor is it taken over in this connection from the cases involving rights in marital property, for no mention of these cases is made in this connection, nor does the suggestion of "matrimonial"

The husband having died, leaving a will by which he had disposed of the whole as though he were sole owner, the widow claimed her share as of a community, and the House of Lords decided unanimously in her favor as to the personal chattels, which alone were before it." Mr. Baty, in *Polarized Law*, 96, explains the case by saying that it proceeded solely on the finding that the settlement made by French law for the parties must be held equivalent to an express contract by them to adopt it. "As foreign law is a matter of fact, it may in the future fail to be shown even for France; and certainly it may fail to be shown in the case of other countries." *Cf.* Dicey, *Conflict of Laws* (2d ed.) 511-14.

[26] Story, *op. cit.* sec. 159; Minor, *op. cit.* sec. 80; 57 L. R. A. 353, n. In *De Nicols v. Curlier* [1900] 2 Ch. 410, Kekewich, J. applied the contract made for the parties by the French code to interests in land in England. The decision seems a clear error, but Westlake, *op. cit.* 81, approves the result believing "the doctrine of tacit contract *on* marriage to be well founded, and that the unity of the matrimonial system of property generally coincides best with the wishes of persons who, by not entering into an express contract, show they do not desire complicated or unusual arrangements."

[27] Just why the first home of the parties is any more "matrimonial" than one to which they subsequently remove is not clear, but the distinction seems to be made. See Wharton, *op. cit.* sec. 191; Story, *op. cit.* sec. 178.

domicile as an intended domicile ever appear in cases of this kind. It is not found in the digests. Only in a very recent work does the term appear,[28] and its use therein is evidently based on the language of the courts in late cases, without additional definition of meaning.

A "matrimonial" domicile for the purpose of divorce, as something different from the actual domicile of husband or wife, gained for a time some recognition in the Scotch cases. In *Jack v. Jack*[29] there was held to be jurisdiction to grant a divorce to a husband who had formerly lived in Scotland with his wife, even though it was admitted in his pleading that he had been for some time a minister of the gospel in the state of New York, without any present intention of returning. The theory the court went on was that the "matrimonial domicile" of the pair was still in Scotland. Lord Neaves said:[30]

> "Perhaps, individually speaking, [the husband] may be domiciled in America. But the question still arises, whether, as regards the married pair, the matrimonial domicile, as it may be called, has been transferred from Scotland to any other country. . . ."

And the meaning of "matrimonial domicile" was explained by the Lord Justice Clerk:[31]

> "It would seem, then, that the place of residence of the married pair for the time is the place where jurisdiction ought to be found to give redress for conjugal infidelity, without inquiring whether the husband's domicile of succession may be in another country. . . . The place of residence has appropriately been called the domicile of the marriage."

Lord Deas, however, characterizes the use of the term "matrimonial domicile" as misleading, figurative and wanting in judicial precision:

> "Domicile belongs exclusively to persons. Having ascertained the domicile of the husband, and the domicile of the wife, the inquiry into domicile is exhausted."

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[28] 9 R. C. L. 510, 512.
[29] (1862) 24 Ct. Sess. 2d Ser. 467.
[30] *Ibid.* p. 476.
[31] *Ibid.* p. 483.

The conception of the "matrimonial domicile" as a temporary home of husband and wife was again brought out in *Pitt v. Pitt*.[32] The Lord Justice-Clerk said:[33]

> "The pursuer's English domicile of origin might subsist for many purposes, and yet he might be domiciled in this country so as to give jurisdiction to a Scotch Consistorial Court."

And Lord Cowan stated that

> ". . . it does not require to be shewn that the domicile to found jurisdiction is the paramount and real domicile of the parties, or, in other words, the domicile for governing succession; but that the essential matter to be investigated in each case is the matrimonial domicile—the residence of the married pair—where, as their home, they live and cohabit, or ought to live and cohabit, as man and wife."

Pitt v. Pitt was reversed in the House of Lords.[34] The validity of the doctrine of "matrimonial domicile" as a basis for jurisdiction was not settled, as the eminent counsel for the respondent, Sir R. Phillmore and Sir Hugh Cairns, abandoned the ground as untenable, a concession suggested by the Lord Chancellor to "be quite in accordance with the law of the case."[35]

But in *Le Mesurier v. Le Mesurier*[36] where the question was considered by the Judicial Committee of the Privy Council, the conclusion on the point was that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." Lord Watson said:

> ". . . any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. . . . The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent."

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[32] (1862) 1 Ct. Sess. 3d Ser. 106.
[33] *Ibid.* p. 117.
[34] (1864) 4 Macqueen, App. Cas. 627.
[35] See also, *Niboyet v. Niboyet* (1878 Ct. App.) L. R. 4 P. D. 1.
[36] (Priv. Counc.) [1895] A. C. 517, 540, 538.

Yet, in the two famous cases of *Atherton v. Atherton*[37] and *Haddock v. Haddock*[38] the fact that a decree of divorce was or was not given by the court of the "matrimonial" domicile was made the turning point as to whether a second state must, under the "due faith and credit" clause, recognize the validity of such a decree given in the absence of the defendant. It would be affectation of learning to go over the ground covered by these and similar cases, in the light of the voluminous discussion of the subject by capable commentators. The one point we want to find is the difference between a "matrimonial" domicile and any other kind of domicile.[39] The *Atherton* case was said in *Haddock v. Haddock* to have been expressly decided on the ground that the "matrimonial" domicile of the parties was in Kentucky. This was what, in the mind of the court, made the difference; and that is all the help on the point given by the Supreme Court cases, except that in a later decision the *Atherton* case was followed on similar facts.[40]

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[37] (1901) 181 U. S. 155.

[38] (1906) 201 U. S. 562.

[39] It will be remembered that in *Atherton v. Atherton* the parties were married in New York and immediately took up their residence in Kentucky. Here the husband, after his wife had left him, had secured a divorce in accordance with the regular Kentucky procedure on the ground of desertion. Later, Atherton was made the defendant in an action for limited divorce in New York, the state to which his wife had returned; and it was there decided that the Kentucky decree was inoperative in New York, and the wife was given the decree prayed for. The United States Supreme Court held this a violation of due faith and credit to the Kentucky divorce. Mr. Justice Gray, in delivering the opinion, cautiously limited the holding to the facts before the court, and pointed out that Kentucky was the "only matrimonial domicile of the husband and wife." In *Haddock v. Haddock,* the parties were married in New York; Haddock went to Connecticut and secured a divorce there on the ground of desertion. The wife remained in New York, and having brought suit for limited divorce, Haddock set up the Connecticut decree. Judgment was given for Mrs. Haddock, however, and this was held to be no violation of due faith and credit.

[40] *Thompson v. Thompson* (1913) 226 U. S. 551. The parties were married and lived in Virginia, where the husband had secured a limited divorce on the ground of desertion. When the wife sued in the District of Columbia, after having made her residence there, it was held that due faith and credit required recognition of the Virginia decree. "It is clear, therefore, under the decision in the *Atherton* case, and the principles upon which it rests, that the state of Virginia had jurisdiction, and the proper courts of that state could proceed to adjudicate respecting it upon grounds recognized by the laws of that state," said the Court. The point was not further discussed.

It has been contended that a "matrimonial domicile" is not simply the common domicile of husband and wife, but is "that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations."[41] It is believed that there would be great difficulty in making this test work. Where ought a husband to be to fulfill his marital obligations? Anywhere, surely. If he has treated his wife with such cruelty that she has been compelled to leave him, his fault is not that he is living in the wrong place, but that he did not behave properly at home. Even if the husband deserts, his wrong is not in going to a new place to live—that is proper enough; the misconduct is in abandoning his wife. In *Atherton v. Atherton,* the New York court found that the wife had left the husband through no fault of hers, and was therefore rightfully domiciled in New York. The same must have been found in *Thompson v. Thompson;* yet in each of those cases the decree secured by the husband in the state where the parties had lived together, and where the husband still was living, was conclusive. If the test suggested is what determines "matrimonial domicile," why was it not open to the New York or District of Columbia court to find, as they did, that the wife was rightfully domiciled within the jurisdiction, and why would not that finding be material?

It has also been suggested that the "matrimonial domicile" is something that stays with a party who is abandoned or who is not in fault, so long as he or she stays within the jurisdiction where the parties had their common domicile, but that such innocent party can move to another jurisdiction and the "matrimonial domicile" will go along.[42] If the husband and wife lived in Mexico, for instance, as in the *Montmorency* case, and he abandoned his wife there, the matrimonial domicile stays with her, and she could transfer it to Texas by going to that state to live. But if this were so, why could not the wife in *Atherton v. Atherton* or in *Thompson v. Thompson* show that she had been wronged, and that when she took up a residence apart from her husband, the "matrimonial domicile" went with her? That is just what she could not do in either one of those cases.

From the language of the judges in the Supreme Court decisions mentioned, it would seem that a "matrimonial domicile" is

[41] Robert J. Peaslee, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457, 469.

[42] *Montmorency v. Montmorency* (1911 Tex. Ct. of Civ. App.) 139 S. W. 1168. See also *Parker v. Parker* (1915 C. C. A. 5 C.) 222 Fed. 186, 137 C. C. A. 626.

regarded as nothing more than the place where husband and wife have their common domiciles,[43] and the use of the term in several recent decisions seems to indicate that this is the sense in which it is used.[44] "Where parties are married out of the state but come to reside in the state afterwards, [they] thus establish a domicile of matrimony therein."[45] Applying this simple definition to the matter under discussion, namely, the use of the term in divorce proceedings, "matrimonial domicile" would, of course, mean the place where the parties last lived as husband and wife with the intent of making that place their home.[46] This too, is the natural meaning of the term. It seems neither necessary nor desirable to make further complications in an already tangled question by ascribing to these words a more difficult meaning.

It may well be that the introduction of this term into the law of divorce was a judicial mistake, "that what in the *Atherton* case . . . was referred to out of abundant caution . . . was later seized upon, in the *Haddock* case, . . . and . . . invested with magical qualities it did not, and does not possess."[47] Perhaps too, it works injustice.[48] In the years since *Haddock v. Haddock* was decided, it has not become any easier to "see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that . . . in a domicile later acquired;"[49] but such a distinction has been made by a court from which there is no appeal in this world, has been taken up by lesser tribunals, and has vitally affected the people whose rights have been decided under

[43] The headnote in the *Thompson* case says: "The state in which the parties were married, and where they reside after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile. . . ." In *Atherton v. Atherton* the marriage took place in New York.

[44] *Perkins v. Perkins* (1916) 225 Mass. 82, 113 N. E. 841; *Callahan v. Callahan* (1909) 65 Misc. Rep. 172, 121 N. Y. Supp. 39; *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056; *Benham v. Benham* (1910) 69 Misc. Rep. 442, 125 N. Y. Supp. 923; *People v. Catlin* (1910) 69 Misc. Rep. 191, 126 N. Y. Supp. 350; *Post v. Post* (1911) 71 Misc. Rep. 44, 129 N. Y. Supp. 754; *State ex rel. Aldrach v. Morse* (1906) 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127. See also (1915) 4 CAL. L. REV. 59, 2 BENCH AND BAR 37.

[45] *State ex rel. Aldrach v. Morse, supra.*

[46] *Callahan v. Callahan, supra.*

[47] 2 BENCH AND BAR 37, 41.

[48] See (1908) 21 HARV. L. REV. 296.

[49] Holmes, J., dissenting, in *Haddock v. Haddock, supra.* See also, Andrews, J., in *Callahan v. Callahan, supra.*

it. Civilization has not come to an end, but human happiness of individuals has been made or marred by it. Unless the doctrine is soon repudiated, it bids fair to become permanently fixed in the law. The real difficulty seems to be not in the term "matrimonial domicile," but in the erroneous rule of law which has been supported by reliance upon it.